

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 98-003-E - ORDER NO. 98-528

JULY 8, 1998

IN RE: Annual Review of Base Rates for Fuel Costs of Duke Power Company.)))	ORDER DENYING REHEARING AND/OR RECONSIDERATION
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JMR

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Rehearing and/or Reconsideration of our Order No. 98-383 filed by the Consumer Advocate for the State of South Carolina (the Consumer Advocate). The Consumer Advocate recommended that the Commission disallow replacement fuel costs of \$2,788,565 incurred due to the shutdown of two nuclear units, Oconee Nuclear Station Units 2 and 3, which were shut down due to problems in the High Pressure Injection system. Our Order No. 98-383 denied the disallowance, and the Consumer Advocate filed its Petition. We have thoroughly reviewed the points made by the Consumer Advocate, however, we must deny the Petition for Rehearing and/or Reconsideration because of the reasoning stated below.

First, the Consumer Advocate alleges that the Commission erroneously found in Finding of Fact No. 12 that licensee event reports (LERs) filed with the Nuclear Regulatory Commission (NRC) are written with the perspective of 20-20 hindsight and elaborate on corrective actions rather than addressing all the facts as known at the time of the incident. Whereas, we agree that NRC Regulations require nuclear licensees to

address all of the facts known at the time of the incident, we cannot agree that the matter “is not a question of hindsight.” As the Consumer Advocate states in his Petition, “By definition, an LER is written after an event.” By definition, then this has to be a matter of hindsight. This ground is therefore without merit.

Second, the Consumer Advocate takes issue with our finding that LERs are “routinely” filed with the NRC which describe certain plant conditions or events, which are used by the NRC Staff to develop a database on plant operations for tracking and trending. The Consumer Advocate states that the purpose of the reports goes beyond the development of a database for tracking and trending. Although we do not deny that this statement may be true, we reiterate our belief that the reports are routinely filed, and that they are used to develop a plant operation database. We discern no error.

Third, according to the Consumer Advocate, further alleged error appears in Finding of Fact No. 12, when we allegedly stated that NUREG – 1022, Rev. 1, Sect. 1.2 addressed the Consumer Advocate’s issue. We must point out that no discussion of this matter was contained in Finding of Fact No. 12. We did, however, make said statement under Conclusion of Law No. 5 at page 12 of the Order. In any event, we still believe that our statement about this section addressing the issue of the Consumer Advocate is a truism. The section quoted states specifically that unintended uses of the LER, such as in prudence reviews, could lead to unintended results, such as NRC licensees adopting a more restrictive reporting threshold in order to reduce the number of reportable events, even though the NRC’s requirement for a low threshold has not changed. The NRC therefore characterizes the use of LERs in prudence reviews as a “misuse” of the reports,

which could be counterproductive to the purpose of the rules. We think that this states a very important policy pronouncement by the NRC, and shows that the use of the LERs as used by the Consumer Advocate in the present prudence case was not appropriate. We therefore reaffirm our belief that the paragraph in question addressed the Consumer Advocate's issue. We hold that the Consumer Advocate's point is non-meritorious.

Fourth, the Consumer Advocate states that our point in Finding of Fact No. 12 that the LER at issue in this case focused on the Company's preventative maintenance program is "simplistic." We note that the Consumer Advocate did not allege that the point was "erroneous," but only "simplistic." We do not think that this can be taken as a valid assignment of error. However, even if it was, we reaffirm our statement. A review of the document in question clearly shows that it concerns Duke's preventative maintenance program. Other related matters may have been discussed, but the bottom line is that the LER is about preventative maintenance. We discern no error.

Fifth, the weight given to the testimony of Duke witness Steve Young by this Commission is alleged to be erroneous by the Consumer Advocate. The Consumer Advocate states its belief that we should have given more weight to Duke's LERs, and other proffered documents, which were unsubstantiated by any testimony. The South Carolina Supreme Court has held that we sit as the trier of fact, akin to a jury of experts. Hamm v. South Carolina Public Service Commission and South Carolina Electric & Gas Company, 309 S.C. 282, 422 S.E. 2d 110 (1992). See also Southern Bell Telephone and Telegraph Company v. Public Service Commission, 270 S.C. 590, 244 S.E. 2d 278 (1978). The latter case quoted with approval language from State, ex rel. Utilities

Commission v. General Telephone Company of the Southeast, 281 N.C. 318, 189 S.E. 2d 705 (1992) as follows: “The weighing of the evidence and the drawing of the ultimate conclusion therefrom...is for the Commission....” 189 S.E. 2d at 739. Although the quoted passage referred to this Commission’s determination of a reasonable rate of return, we think that its general principle holds true for the evidentiary situation in the case at bar. Clearly, this Commission had the right to weigh the live testimony of Duke witness Steve Young against the unsubstantiated documents presented by the Consumer Advocate, and conclude that the testimony of witness Young was more credible, and, therefore, entitled to more weight. The Commission has no difficulty in agreeing with the Consumer Advocate that statements in documents provided to the government may be useful, as discussed in Midlands Utility v. S.C. Dept. of Health and Environmental Control, 298 S.C. 66, 378 S.E. 2d 256 (1989), but we retain the right to weigh one piece of evidence against another and conclude that one piece of evidence is entitled to more weight than another.

In addition, the Consumer Advocate states that we erroneously concluded that the LERs are useful only in the context of finding better and safer ways to operate nuclear plants. The Consumer Advocate misstates this Commission’s holding. We stated that the only evidence explaining the LERs was that they were nuclear specific documents and were useful in Duke’s ongoing obligation to find better and safer ways to operate its federally licensed nuclear plants. If other evidence had been presented by the Consumer Advocate as to other possible uses of the LERs, we certainly would have considered it. These allegations of the Consumer Advocate are therefore without merit.

The Consumer Advocate next assigns as error that “the Commission apparently concludes that the Consumer Advocate's position is not worthy of consideration because he presented no witnesses and because the only explanation of the appropriate use of LERs is from Duke’s own witness.” This Commission has never stated that the Consumer Advocate’s position is not worthy of consideration. In fact, we devoted several pages of analysis to that position in Order No. 98-383. However, we also analyzed certain NRC regulations and policy statements which caution against use of LERs in areas that were unintended, such as in prudence reviews. We note that the Maryland decision cited by the Consumer Advocate came out the year before the NRC Policy Statement quoted by us on page twelve of Order No. 98-383 (1990 vs. 1991). Therefore, there is no way that the Maryland Commission could consider this Policy Statement in making its decision. This contention of the Consumer Advocate is therefore non-meritorious.

Further, the Consumer Advocate complains that we erroneously found that the Consumer Advocate’s counsel failed to establish “any facts to support her concerns about the Duke outages because Duke witness Young repeatedly declined to agree with the Consumer Advocate’s counsel’s characterization of the evidence before this Commission.” We believe that the Consumer Advocate is basically saying the same thing that he has said several times before, i.e. that this Commission should have given less weight to witness Young’s testimony, and more weight to the LERs, which were unsupported by any other evidence. We have, of course, addressed this issue already. We do not take issue with the Consumer Advocate’s further elaboration, which states that a

party may present documentary evidence. S.C. Code Ann. Section 1-23-330(3) (Supp. 1997) also states that any party may conduct cross-examination. Also, while we agree that nothing absolutely requires a party to submit live testimony to establish facts to support his position, we think that the lack of live testimony certainly goes to the weight of the evidence presented to support the position. Again, the issue in this case is our giving the greater weight to the evidence presented by the live witness, as opposed to the lesser weight given to the documents submitted by the Consumer Advocate. We are clearly entitled under the law to make this judgment, and to afford whatever weight we think is appropriate to the evidence presented to us. Under the law, our decisions must be supported by substantial evidence, and we believe that this decision was certainly so supported.

Next, the Consumer Advocate alleges that this Commission erred in finding that the Staff reviewed the outages in question and the reports and correspondence between the NRC and the Company, and that we erred in attaching any weight to Staff witness Watts' testimony, with respect to the Oconee outages. We disagree with the Consumer Advocate's statement that Staff witness Watts did not review the LERs associated with the outages in question, the NRC documents, or the Company's letter enclosing a fine and responding to the NRC Notice of Violation prior to the hearing. However, we note that he made no determination as the result of that review. We would therefore state that the basis for our holding which refuses the disallowances proposed by the Consumer Advocate is the evidence presented by Duke witness Young as discussed in detail in Order No. 98-383.

The Consumer Advocate also maintains that we erred in finding that Duke took reasonable steps to safeguard against error and to minimize the total costs of providing service based on the testimony of Staff witness Watts and Duke witness Young. We have addressed in the preceding paragraph the allegation with regard to the testimony of Commission Staff witness Watts. We believe, however, once again, that we properly relied on the testimony of Duke witness Young to support our conclusions. We do not agree with the Consumer Advocate's allegations that the testimony of Young was unreliable, merely because there may have been some conflicts between his testimony and certain statements made in the unsupported LERs. Under our South Carolina law, it is not for the Consumer Advocate to say what constitutes the only "reliable, probative and substantial evidence" on the matter of the outages. It is for this Commission to make that determination as the trier of fact. Once again, we found that Mr. Young's testimony was more "reliable, probative, and substantial" than the statements made in the LERs. This judgment was ours to make, after hearing all of the evidence, and we made it. Our decision is clearly supported by the substantial evidence in the record. We therefore discern no error on this point.

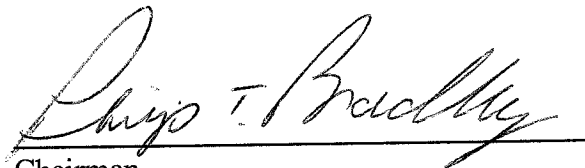
Finally, the Consumer Advocate alleges that Duke ratepayers are suffering irreparable harm in that they are required to pay replacement fuel costs "for an outage that resulted from the Company's failure to take (make) every reasonable effort to minimize fuel costs." Such is simply not the case, as we noted in Order No. 98-383. We held in that Order that, pursuant to Duke witness Young's testimony, Duke made every reasonable effort to minimize fuel costs that was known at the times in question. We

resolved any conflicts between Young's testimony and the LERs in Young's favor. Young was present at the hearing, presented live testimony, and was available for cross-examination by all parties. Again, we simply found his testimony to be more probative and compelling than the documentary evidence supplied by the Consumer Advocate. Therefore, we believe the Consumer Advocate's final point is non-meritorious.

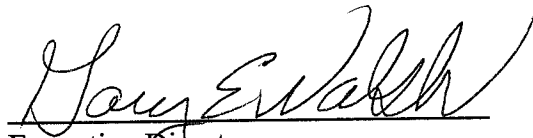
Because of the above-captioned reasoning, we deny and dismiss the Petition of the Consumer Advocate.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:


Chairman

ATTEST:


Acting Executive Director

(SEAL)